still site near Bainbridge, Georgia (R. 230-237) and further testified as to certain conversation he had had with Wood concerning certain vehicles. (R. 241).

Three witnesses gave testimony concerning certain property that had been rented by Raymond F. Garcia to a Mrs. Bowen (R. 249-263), and that the land belonged to one Frank L. Walden who in turn testified that he had seen certain trucks and other vehicles near the property during the time of the alleged conspiracy. (R. 263-266). Witness Charlie McCallister also testified that he saw certain vehicles near the Walden property. (R. 266-270). The description of the vehicles given by witnesses Walden and McCallister corresponded in part to descriptions of vehicles given by Witness Nettles. (R. 82, 95, 99).

Then five witnesses gave testimony concerning certain telephones and long distance calls charged to those numbers. Such was the effect of the testimony of Frances McKay (R. 270-280), Ira Allen (R. 282-297; R. 368-380), Vascal S. Martin (R. 297-320), Lawrence D. Bowen (R. 320-341) and John S. Ford (R. 431-435).

The next group of witnesses called by the Government were law enforcement officers who gave testimony that they had either participated in raids on certain stills or had visited still sites after they had been raided. Such was the testimony of Raymond F. Branch (R. 354-356) and H. G. Ferguson. Witness Ferguson was able to identify one of the defendants in this cause, Carlos Adkins, as one of the persons who had been at the still site in Huston County, Alabama, when it was raided on April 12, 1959. (R. 382). George Tunlin II testified that he participated in a raid on a whiskey still near Bainbridge, Georgia (R. 471), as did Charles G. Covington

(R. 482), at which Robert Keel and Carlos Adkins were arrested. (R. 484). Similar testimony concerning the still in Bainbridge, Georgia, and another still located in Wakulla County, Florida, by Daniel J. Hancock (R. 511), Kenneth R. Garrett (R. 539), Donald E. Perry (R. 547), Homer Hathcock (R. 550), Lofton Clover, (R. 563) and A. E. White (R. 580). The testimony of these officers is entirely circumstantial insofar as showing any connection between those raids and the Petitioner.

At the close of all of the Government's evidence, the Petitioner made a motion for a judgment of acquittal (R. 589) which motion was denied by the trial judge. (R. 595).

The case as presented by the defense tended to show that the various defendants had no connection with the alleged still operation. Witness Archie D. Carmichael testified that he lived near Geo Madison and that the first he knew of such an operation was when he read it in the paper (R. 448). John A. Rudd, a Municipal Judge from Tallahassee, Florida, testified that the Government's witness Robert Dale Nettles' reputation for truth and veracity was bad (R. 466). J. T. Haire's testimony was to the effect that on the 29th of September, 1959, one of the principal dates in this trial, the Defendant Wood was in jail in Attapulgus, Georgia. (R. 598-603). The testimony of Robert Hardwick was to the effect that the automobile allegedly used by Kenneth Wood in February, 1959 was not purchased or delivered to Defendant Wood until March 1959. (R. 604-610). Witness A. L. Ward testified that he lived within 400 yards of the still allegedly operated by the defendants in Bainbridge and that he knew nothing of the operations of the still until the day after it was raided. (R. 618). Winfield Williams, a person alleged to have been

connected with the defendants in the illegal still operation gave testimony that he had never worked for Kenneth Wood. (R. 650).

On June 9th, 1960, the jury returned a verdict of guilty against the Petitioner and every other defendant in the cause.

JURISDICTION IN COURT OF FIRST INSTANCE

The basis for federal jurisdiction in the District Court is provided by Title 18, United States Code, 3231, which provides in part: "The District Courts of the United States shall have original jurisdiction, exclusive of the courts of the states, of all offenses against the laws of the United States." The indictment charged a conspiracy to violate sections, 5601, 5606, 5008(b), 5632 and 7206(f), Title 26, Internal Revenue Code. (R. 2).

ARGUMENT

POINT ONE

THE PERTINENT PROVISIONS OF RULE 19, OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES APPLICABLE IN THE CASE BEFORE THIS HONORABLE COURT ARE: THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT; THE TRIAL COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND THE COURT OF

APPEALS HAS SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. IT IS THE LAW IN THE COURTS OF THE UNITED STATES THAT IN ORDER TO RENDER A VERDICT OF GUILTY IN CIRCUMSTANTIAL EVIDENCE CASES, THE JURY MUST REASONABLY CONCLUDE THAT THE EVIDENCE EXCLUDES EVERY REASONABLE HYPOTHESIS EXCEPT THAT OF GUILT.

The rule of law to be applied by the judge when he sits as the trier of fact or to be applied by the judge in order to determine whether or not evidence is sufficient to go to the jury was clearly stated in *Cuthbert v. United States*, 278 F. 2d 220 (5th Cir. 1960):

> ". . . We cannot and do not agree however that in arriving at a decision that, as a matter of law, evidence is sufficient to take the case to the jury, it is not necessary that the evidence can reasonably be found to be consistent with the conclusion of guilt and wholly inconsistent with every other reasonable conclusion. On the contrary, we are of the clear opinion that in a case where the evidence relied on to establish guilt is entirely circumstantial, it is essential to a just decision by the district judge that the evidence makes out a fact case for the decision of the *jury, that the jury might reasonably find not only that the evidence is consistent with a finding of guilt but that it is not consistent with any other reasonable conclusion.* (emphasis ours) *Cuthbert*, supra, page 224.

Once the test of the evidence, as a matter of law, is made and it is found to be sufficient for submission to the jury, it is then incumbent upon the judge to charge the jury as to the law. Since the law states that the jury must be able to find that the evidence is consistent with guilt and inconsistent with any other reasonable conclusion in order to render a verdict of guilty, the judge should so instruct them. To allow the jury to try the facts without the benefit of such an instruction is to make the rule of law a hollow shell. It is not enough that the judge is of the opinion that the jury could reasonably reach such a conclusion, but the jury must in fact reach such a conclusion before finding guilt. To allow the judge to rule as a matter of law that the case is sufficient to go to the jury because he feels that the jury could reasonably reach such a conclusion and then to fail to charge the jury that they must reach the conclusion, in effect substitutes the judge as the trier of fact, thereby invading the province of the jury.

The rule requiring such a charge to the jury has long been recognized by the Court below. The general instruction which has been approved by that court as satisfying the requirement was set forth in *Stutz v. United States*, 47 F. 2d 1029 (5th Cir. 1931), a circumstantial evidence case involving a violation of the National Prohibition Act:

> ". . . Only two of the assignments of error require special notice, both relating to the charge of the court. An instruction was duly requested in these words: 'The Court charges you that before you can convict on circumstantial evidence the circumstantial evidence must be consistent with the guilt of the defendant upon trial and inconsistent with his innocence, and the evidence must be so strong, clear and conclusive as to the guilt of the defendant as to remove every other

> reasonable hypothesis except the defendant's guilt.' This was a correct statement of the law, and pertinent to the case. 16 C. J. Sec. 1568; Chass v. United States (C.C.A.) 258 F. 911. The only charge given in respect to circumstantial evidence was this: 'There are cases where the testimony is positive and direct. There are other cases where the testimony is indirect, circumstantial, as we call it, but the law recognizes that circumstantial evidence is just as valuable evidence in determining a case as is direct testimony, excepting where the testimony is circumstantial you should exercise more care. You should carry along with it of course, the legal idea that the defendant is innocent until he is proven guilty, but from circumstantial evidence you may draw just as strong a conclusion as you may draw a conclusion of innocence.' This charge is not the equivalent of that refused, nor even of the same tendency, and did not cure the erroneous refusal." *Stutz*, supra, page 1030.

Thus a refusal to give the circumstantial evidence charge as requested is erroneous and reversible error. It would appear that, barring any change in the general rule as to submitting circumstantial cases of a criminal nature to a federal petit jury, the charge requested by counsel for petitioner in this case (R. 733-735, 740-742) should have been given to the jury. The only remaining question is whether or not the Decision in *Holland v. United States*, 348 U.S. 121, 99 L. Ed. 150, 75 S. Ct. 127 (1954), changed the general rule or merely carved out a narrowly defined exception.

B. THE DECISION IN HOLLAND V. UNITED STATES AS TO THE NECESSITY OF CHARGING THE JURY ON CIRCUMSTANTIAL EVIDENCE IS, BY ITS OWN

LANGUAGE, LIMITED TO THE PECULIAR CIRCUMSTANCES OF A "NET WORTH" TAX PROSECUTION.

It is the contention of the petitioner that the rule set down in *Holland v. United States*, supra, should be limited to the facts upon which that prosecution and upon which similar "net worth" tax prosecutions are founded. Petitioner further submits that it was the intention of this Honorable Court to so limit that decision. This Court's decision in the *Holland* case arose from an awareness that "net worth" tax prosecutions are an unusual and highly complex breed of cases which utilize circumstantial evidence in a type of situation which renders any other form of proof almost impossible to obtain. This Court took notice of this peculiarity when it said:

> ". . . One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy." *Holland*, supra, 348, U. S. at 126.

Thus it was realized that the evidence which could explain the source of the taxpayer's net worth was peculiarly within the realm of the knowledge of the taxpayer himself. It was further noted that there were an infinite number of possible sources of funds to which one could attribute the taxpayer's net worth. Therefore, in such a case, if the jury were instructed that the evidence must be consistent with guilt and inconsistent with any hypothesis of innocence before they could convict, there would be an insurmountable burden of proof placed on the prosecution to negative every other possible source of funds which could have resulted in the taxpayer's net worth.

These differences from an ordinary criminal case were emphasized by the court and it was on that basis that the traditional safeguards were abandoned. It is clear, however, from the language used by the court that the abandonment of the general rule was only for the purpose of "net worth" prosecutions.

> ". . . We concluded that the method [net worth theory] involved something more than the ordinary use of circumstantial evidence in the usual criminal case. Its bearing, therefore, on the safeguards traditionally provided in the administration of criminal justice called for a consideration of the entire theory." *Holland*, supra, 348 U. S. at 124.

It is to be noted that the court conceded that the circumstantial evidence charge requested in the *Holland* case, which is essentially the one requested by this petitioner, was one of "the safeguards traditionally provided in the administration of criminal justice".

In further recognition of the narrowness of the application of the ruling in the *Holland* case, the Court said:

> ". . . The complexity of the problem is such that it cannot be met merely by the application of general rules." *Holland*, supra, 348 U. S. at 129.

From the above analysis of the *Holland* decision, petitioners respectfully submit that its ruling was not intended to effectuate a change in the safeguards traditionally provided in the administration of criminal justice excepting as such safeguards apply to a "net worth" tax prosecution. Therefore, petitioner further submits that since the case at bar involves a charge of criminal conspiracy it was clearly erroneous to refuse the

requested charge as to circumstantial evidence on the basis of the *Holland* decision.

Petitioner realizes that not only must there be an error in the charge to the jury but it must also be shown to be a prejudicial error before this Honorable Court will exercise its supervisory powers. The question of whether or not error is prejudicial is not one which is easily answered nor is it one about which there does not exist some considerable disagreement. It is the contention of the Petitioners that the failure to give the requested charge, that circumstanial evidence must be consistent with guilt and utterly inconsistent with any reasonable hypothesis of innocence, was error of a highly prejudicial nature. When one realizes the maze of inferences which may be drawn from circumstantial evidence he must at once become aware of the great possibility of confusion and conjectural thinking on the part of the jury. To assure that a man's life or liberty are not placed in the balance of such unguided thinking the Courts of this nation have seen fit to help guide the jury through the maze. It is from judicial reluctance to see an innocent man convicted that have arisen the rules with regard to circumstantial evidence. The law is well settled that before the evidence is sufficient to be submitted to the jury it must meet the standard test which requires that the jury be reasonably able to find that circumstantial evidence is inconsistent with any other hypothesis than that of guilt.

It is difficult, if not impossible, to determine whether or not the jury in this case did apply the test. It is therefore a distinct possibility that the jury might very well have found that there were reasonable inferences of innocence but because they were unguided they still found a preponderance of evidence pointing to guilt and therefore convicted. Such

a conviction is, as a matter of law, incorrect and should not stand. How is the appellate court to judge this question?

In the case of *Kotteakos v. United States*, 328 *U. S.* 750, 66 *S. Ct.* 1239, 90 *L. Ed.* 1557 (1946) both the majority and the dissenters agreed that there was error in the charge to the jury. The point of disagreement was whether or not the error was prejudicial. Speaking for the majority, in finding that the error was prejudicial, Mr. Justice Rutledge had this to say:

> ". . . Some aids to right judgment may be stated more safely in negative than in affirmative form. Thus it is not the appellate court's function to determine guilt or innocence . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by error . . .
>
> ". . . In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had on the jury's decision . . .
>
> ". . . If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is

from a constitutional norm or a specific command of congress . . . *But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.*" (emphasis ours) *Kotteakos*, supra, pages 763-765.

POINT TWO

PETITIONERS' OBJECTIONS TO THE TRIAL COURT'S OMISSION OF A CHARGE ON CIRCUMSTANTIAL EVIDENCE WERE RAISED IN SUCH A MANNER AS TO COMPLY WITH THE REQUIREMENTS OF RULE 30 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 30 of the Federal Rules of Criminal Procedure, in effect, requires that counsel state clearly the matter to which he objects and set out the grounds upon which his objection is based. However, "Fed. Rules Crim. Proc. rule 30, 18 U. S. C., does not require a lawyer to become a chattering magpie." *United States v. Kelinson*, 205 F. 2d 600, 601 (2d Cir. 1953).

An examination of the record (R. 733-742) discloses that approximately nine pages of the record are devoted to the objections, and exchanges pertaining thereto, which were raised by petitioners with respect to the charge on circumstantial evidence.

"Mr. Douglas:

> Your Honor, may I ask this question; have I a right to assume that in your general charge on circumstantial evidence that you would charge the jury that circumstantial evidence is received with caution by the jury?"

In reply to this, the Court said, in part:

"The Court:

> As I understand the law, the proposition that when circumstantial evidence forms a part or all of the case then that evidence must exclude beyond any and every reasonable hypothesis is no longer the law, and that has been changed in the Fifth Circuit."

Does not the Court's reply clearly point out the fact that the Court was aware of the nature of the objection and was also aware of the charge sought to be obtained by counsel? Later in the exchange Mr. Douglas said:

"Mr. Douglas:

> Well, it is your view that my request–

"The Court:

> It is my view that I should not, and it is not my intention to, charge the jury that when a case is based upon circumstantial evidence, such as this case partly is, that they should receive that caution with–receive that–consider that evidence with great care and caution. Would be error, and I am not going to charge that."

The Court delivered a full and exhaustive oral charge at the conclusion of which, in accordance with Rule 30, supra, the following occurred (R. 769, 770):

> "Mr. Douglas:
>
> > No exceptions to the charge as given; however, I would like to preserve my exception as to the requested charge."

It is the petitioner's contention that the above exchange between Court and counsel served fully to inform the Court of the fact that counsel was requesting a charge that included the rule that circumstantial evidence be inconsistent with any hypothesis except that of guilt; and Petitioners further submit that the Court's own language clearly reflects its understanding of the requested charge. Petitioner admits that in many instances, counsel did not speak with the articularity of a prepared oration, but respectfully urges that mere inadequacies in mode of expression should not be a bar to this petition when in fact they were effective in communicating Petitioners' contentions to the Court. When counsel spoke of the "general charge" it would appear that it was immediately obvious to the Court that he was referring to the charge that had been approved by the Court of Appeals for the Fifth Circuit in *Stutz v. United States*, Point One, supra, since the Court at once, informed counsel that he felt that such a charge was no longer the law.

The pervading question remains. Were the purposes and objectives of Rule 30 fulfilled by Counsel in the trial court? As stated by the Court of Appeals for the 10th Circuit:

> ". . . 'The purpose of the rule is to afford the Judge an opportunity to correct any mistakes which may have

> been made in giving his instructions before the jury retires to consider its verdict.'" *Davis v. United States*, 227 F. 2d 568, 570 (10th Cir. 1955)

Petitioner respectfully urges that the trial judge was afforded an opportunity to correct his mistake before the jury, in the instant case, retired to reach a verdict.

POINT THREE

THE TRIAL COURT'S OMISSION OF THE REQUESTED CIRCUMSTANTIAL EVIDENCE CHARGE WAS SUCH PLAIN ERROR AND AFFECTED SUCH SUBSTANTIAL RIGHTS AS WOULD WARRANT NOTICE OF IT BY THIS COURT, NOTWITHSTANDING A RULING THAT SUCH REQUEST AND OBJECTION TO THE DENIAL THEREOF WERE NOT BROUGHT TO THE ATTENTION OF THE TRIAL JUDGE.

Petitioners respectfully urge that the refusal of the Honorable Trial Judge to charge the jury as requested by counsel for Petitioners was an error which seriously affected the fairness of the proceeding. It is submitted that there was at least a general objection to the refusal to give the requested charge and that such a request has been held sufficient, where error was present, to warrant a review by the appellate court. In *United States v. O'Connor*, 237 F. 2d 466 (2d Cir. 1956) the Government argued that a requested charge to the jury should not be considered on appeal because of a failure to comply with Rule 30 of the Federal Rules of Criminal Procedure. With respect to the Government's argument, the Court said:

> ". . . However, defendant did make a general objection to the trial court's charge' as to the net worth method of computation', and specifically requested the court

> to charge that the establishment of an accurate starting net worth was vital to the Government's case. This request was denied. Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C.A. provides that . . . /page 472/ But in criminal cases federal appellate courts have sometimes noticed errors to which no proper objection has been taken. 'if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' The Federal Rules of Criminal Procedure have not abolished this inherent power. We think that in this case we should consider the charge on the merits, both because the alleged rights of defendant and because, under the circumstances, defendant's general objections and requests were sufficient to preserve this point."

Petitioners submit that the requests for charges made in this case were at least as specific, if not more so, than those in the *O'Connor* case and that the error was just as substantial. In view of that decision it is respectfully requested that the charge in the case at bar be considered on the merits. Petitioners also urge that under the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., the refusal to charge as requested was such plain error as may be noticed although not brought to the attention of the trial court in the proper manner. *O'Connor v. United States*, supra.

CONCLUSION

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari be granted.

ZACH H. DOUGLAS,
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Jacksonville 2, Florida

Attorney for Cleo E. Lovett,
Petitioner.

PROOF OF SERVICE

I hereby certify that I have made service of 3 copies of the foregoing Petition for Certiorari upon the Solicitor General, Department of Justice, Washington 25, D. C. by depositing same in an envelope so addressed and placing the same in the United States Post Office at Jacksonville, Florida, on the 17th day of May, 1961, with sufficient postage to insure delivery.

ZACH H. DOUGLAS,
505 Lynch Building,
Jacksonville 2, Florida

Attorney for Cleo E. Lovett,
Petitioner.

I further certify that I have also mailed, in due course of mail, a copy of the foregoing petition to Honorable Hartwell Davis, United States Attorney, Middle District of Alabama, and a copy to the Honorable Ira Dement, Assistant United States Attorney for the Middle District of Alabama, on this the 17th day of May, 1961, with postage thereon fully prepaid.

Attorney for Petitioners